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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1245

SAMUEL OKIN, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings and opinion of the Commission rendered on September 7, 1944, and its order of the same date, have not yet been officially reported but have been published as Holding Company Act Release No. 5271. The opinion of the Circuit Court of Appeals for the Second Circuit is reported at 145 F. 2d 206.

JURISDICTION

The decree of the Circuit Court of Appeals dismissing the petition for review was entered on December 30, 1944 (R. 101). Orders of Mr. Justice Jackson, dated March 27, 1945, and April 26, 1945, extended to May 8, 1945, the period during which

a petition for a writ of certiorari with respect to such order could be filed (R. 102–03). The petition for a writ of certiorari was filed May 8, 1945. The jurisdiction of this Court is invoked by petitioner under Section 24 (a) of the Public Utility Holding Company Act of 1935 (49 Stat. 803, 834–835, 15 U. S. C. § 79x (a)), and Section 240 (a) of the Judicial Code, as amended (28 U. S. C. § 347 (a)).

STATUTE INVOLVED

The statute involved is the Public Utility Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. § 79, hereinafter referred to as "the Act"). Sections 11 (e), 18 (f) and 24 (a) thereof (15 U. S. C. §§ 79k (e), 79r (f) and 79x (a)) are set forth in the Appendix, *infra*.

QUESTION PRESENTED

Where the Securities and Exchange Commission has made an order under Section 11 (e) of the Act approving a reorganization plan, which is not to be consummated unless and until approved and enforced by an appropriate district court, may an objecting stockholder challenge the plan by a petition to review the Commission's order in a circuit court of appeals, or is he limited to the district court enforcement proceedings and to an appeal from any adverse order therein?

STATEMENT

Under Section 11 (b) of the Act (15 U. S. C. § 79k (b)), the Securities and Exchange Commission (hereinafter referred to as "the Commission") may order

such action as is necessary to bring about the integration of holding company systems, to simplify their capital structures, and to insure an equitable distribution of voting power among their security holders. Under Section 11 (d) (15 U. S. C. § 79k (d)) the Commission may, if necessary, apply to a court to enforce compliance with any administrative order issued under subsection (b). Of immediate application is Section 11 (e) under which a company may submit its own plan for compliance with the requirements of subsection (b). If, after hearing, the Commission finds such plan necessary to effectuate the provisions of subsection (b) and fair and equitable, it must make an order approving the plan; and thereafter, at the request of the company, the Commission may apply to a federal district court to enforce and carry out the provisions of the plan.

Such a plan (hereinafter referred to as "the Plan") was filed with the Commission on March 6, 1944, by United Gas Corporation (hereinafter referred to as "United"). Joining in the filing of the Plan were Electric Power & Light Corporation (hereinafter referred to as "Electric"), the corporate parent of United, and Electric Bond and Share Company (hereinafter referred to as "Bond and Share"), the corporate parent of Electric. The Plan, in substance, provided for a reorganization of the security structure of United, and for the compromise of all claims in and between United, Electric, and Bond and Share. Briefly stated, United was to issue $100,000,000 of first mortgage bonds, the proceeds of which were to

be used to retire its publicly-held first preferred stock (at a cost of some $53,000,000), and to provide payment of $44,000,000 in cash to Bond and Share in full settlement of all the claims and interests of Bond and Share in and against United, consisting principally of $52,925,000 in debt claims; in addition, various measures proposed for the recapitalization of United were to give it a simplified security structure having a reasonable relation to its earning capacity. Bond and Share conditioned its joinder in the Plan upon obtaining Commission authorization for open market purchases of its outstanding preferred stocks and the same order which approved the Plan gave such authorization upon specified conditions.

The Commission's order approving the Plan was entered on September 7, 1944 (R. 62–71), and on September 8, 1944, the Commission, at the request of the companies, applied to the United States District Court for the District of Delaware for enforcement of the Plan. Both the plan and the Commission's order of September 7 contained an express condition making effectuation of the Plan and of any of the transactions contemplated therein contingent upon entry of an order by the District Court approving and enforcing the Plan (R. 66).

On September 20, 1944, Samuel Okin, the petitioner herein, filed, in the Circuit Court of Appeals for the Second Circuit, a petition to review the Commission's order approving the Plan (R. 1–54). A motion by the Commission for dismissal of the petition for review was heard by that Court on October

2, 1944. This motion was joined in by the interested companies: United, Electric and Bond and Share. The printed record does not contain their moving papers and they have not been named as respondents. The motion was granted in an opinion rendered on October 20, 1944 (R. 93–100), and the order of the Court dismissing the petition for review was entered on December 30, 1944 (R. 101). This is the order which is the subject of the petition for a writ of certiorari.

Meanwhile, the Delaware District Court conducted hearings in the enforcement proceeding before it. Okin participated in that proceeding, introducing evidence and filing a brief in which he voiced his objections to the Plan at considerable length. On November 21, 1944, the District Court entered an order approving and enforcing the Plan. See *In re United Gas Corporation*, 58 F. Supp. 501.

Okin thereafter filed an appeal to the Circuit Court of Appeals for the Third Circuit from the order of the district court. That appeal is now pending and relates only to so much of the order of the District Court as enjoined stockholders and other persons from interfering with steps to be taken to carry out the Plan. Okin did not request the Third Circuit to stay the operation of the plan,[1] and the Plan has, in fact, been fully executed. Whether or not it would be feasible in any respect to set aside the exe-

[1] The Second Circuit had previously denied Okin's motion to restrain the Commission from taking part in the district court proceeding.

cuted Plan in the event that some reviewing court should conclude that the Commission and the district court erred in approving the Plan,[2] we rest our objections to the granting of the writ upon grounds other than mootness.

ARGUMENT

The principal question raised by the petition concerns only the proper court in which petitioner may assert his objections to the Plan. While a decision in accordance with petitioner's construction of the statute would be a source of confusion and inconvenience in the administration of the Act, the only effect of the holding of the court below was to require him to press his objections in a district court, subject to the ordinary provisions for appellate review of district court orders, rather than to permit direct review of the Commission's order of approval in a circuit court of appeals. The decision below is correct and in accord with decisions of other circuit courts of appeals involving related questions.

1. The opinion of the court below reaches the only rational result which takes into account the provisions of Section 11 as well as those of Section 24 of the Act. Section 11 (b) makes it the duty of the Commission to impose by order upon companies in the holding company systems requirements for inte-

[2] Okin's objection to severable portions of the order applicable to Bond and Share's use of funds derived from consummation of the plan is discussed below. It is our information that only a portion of the funds in question has thus far been expended.

gration and simplification. Under Section 11 (c) a year, subject to possible extensions of time for an additional year, is permitted for compliance with an order under 11 (b). By the last sentence of 11 (b) "Any order made under this *subsection* shall be subject to judicial review as provided in section 24" [emphasis supplied]. The reason why this reference to the provisions of Section 24 (providing generally for review in circuit courts of appeals) is expressly limited to orders under subsection (b) becomes apparent when we turn to the provisions of subsections (d), (e) and (f).

Congress contemplated that reorganization techniques should be available for compliance with section 11 (b) orders, and subsections (d) and (e) are in many respects a self-contained reorganization statute with provisions defining the respective reorganization functions of court and agency which are comparable to the relationship between the Interstate Commerce Commission and the courts prescribed in the previously enacted Section 77 of the Bankruptcy Act. Section 11 (f) provides for a similar allocation of function as between the Commission and a reorganization court where the court's reorganization jurisdiction stems from sources other than the Holding Company Act.

Section 11 (d) authorizes the Commission to apply to a District Court to enforce a Section 11 (b) order, and the District Court is authorized, to the extent necessary for such enforcement, to take exclusive jurisdiction, appoint a trustee, and dispose of the

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assets of the company in question "in accordance with a fair and equitable reorganization plan which shall have been approved by the Commission after opportunity for hearing." Such a plan may have been proposed by the Commission in the first instance or by an interested person. Section 11 (e) permits a company subject to the Act to initiate a plan of compliance with Section 11 (b) even in advance of a Section 11 (b) order and, if the Commission approves the company's plan, it may at the request of the company apply for similar court enforcement, dependent upon court approval of the plan, after opportunity for hearing, as fair and equitable and appropriate.[3] The power of the District Court to review the Commission's action in approving a plan is at least as broad as any that could be exercised by the Circuit Court of Appeals, which is not required to give opportunity for hearing to security holders other than petitioner, and which under the Holding Company Act, unlike some federal statutes, has no enforcement jurisdiction.[4] Section 11 (f), applicable

[3] Since court enforcement occurs only at the company's request, an order of the Commission approving a Section 11 (e) plan which does not contemplate court enforcement may be immediately operative to license the transaction concerned, and since such an order deals with the rights of classes of security holders *inter sese*, an objecting member of a class affected would have standing as a person aggrieved to challenge such an order under Section 24 (a). See *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80; *New York Trust Co.* v. *Securities and Exchange Commission*, 131 F. 2d 274 (C. C. A. 2), denied, 318 U. S. 786.

[4] Compare National Labor Relations Act, Sec. 10(e), (f), 49 Stat. 453 (29 U. S. C. §160(e), (f))

to bankruptcy and other reorganizations in the federal courts, likewise adopts the sequence of approval first by the Commission and then by the reorganization court.

An order of the Commission approving the plan, which is to be operative only if subsequently approved by a district court pursuant to subsection (d) or (e) or under some independent source of jurisdiction recognized in subsection (f), stands on an entirely different footing from the ordinary order of the Commission for which the review provisions of Section 24 (a) were evidently intended. Where the order carries an immediate sanction or is immediately operative to license a transaction, any person "aggrieved" is given by Section 24 (a) sixty days in which to seek review in an appropriate circuit court of appeals.[5] But where the Commission's order approving a plan is only a preliminary step to approval and enforcement thereof by a district court, it is obvious that the order in question is wholly unrelated to the type of order for which Congress designed the review provisions of Section 24 (a). Such an order, while a final order in the sense that it is the last step in proceedings before the Commission, is but an inter-

[5] Section 11 (b) orders do not carry an immediate sanction, but, as previously noted, are nevertheless expressly made reviewable under Section 24 (a). Since, however, Section 11(c) provides for compliance with an order under Section 11(b) within a year subject to extensions of time, this time-lag would cover the normal period for review of such an order. Section 11(e), on the other hand, does not provide for any time-lag between Commission approval of a plan and the institution of enforcement proceedings if requested.

locutory step in a statutory process in which both the administrative agency and the enforcement or reorganization court must act before the order has any effect upon the rights of security holders. For purposes of direct review in a circuit court of appeals Section 24 (a) must be regarded as inapplicable to such a Commission order for the same reasons which led to the decision that general provisions for review of agency orders do not apply to interlocutory orders. See *Federal Power Commission* v. *Metropolitan Edison Company*, 304 U. S. 375. To the extent that a Commission order approving a plan may be regarded as final with reference to the review of that order which takes place in the enforcement or reorganization court, then that specific procedure for judicial review of the particular order in question must be considered as operative to the exclusion of the general provisions of Section 24 (a). When the enforcement court does act, either enforcing or refusing to enforce the plan, it is the order of the enforcement court upon which further review must focus, and that is governed by the ordinary provisions for appellate review of district court orders.

2. This construction of the Act is bolstered by a consideration of the circumstances that follow upon a contrary construction. If a petition for review could properly be filed, under Section 24 (a), in the Circuit Court of Appeals of the Circuit wherein the "aggrieved" person resides, such court would, upon the filing with it of the administrative record, acquire

"exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part." Giving full effect to that language of Section 24 (a) would mean that a single security holder, by electing to file his petition with a circuit court of appeals, can completely displace, so far as other security holders are concerned, the express statutory function of the district court to determine whether the plan is fair and equitable and appropriate. Meanwhile, persons who may have relied upon the published notice of opportunity to be heard in the district court may have suffered the sixty-day period for review to elapse without filing their own petitions. These persons, thus deprived of any opportunity to challenge the plan, may represent entirely different interests and have entirely different objections to the plan from those of the particular security holder whose petition has displaced the Section 11 (e) enforcement proceeding.

If, on the other hand, disposition of the petition for review in the circuit court of appeals would not determine all issues concerning the merits of the plan, the possibility of subsequent attacks on the plan, involving new issues, being made in the district court, and the further possibility of appeals from the district court's order, raise dangers of obstruction and delay. In fact, petitioner Okin has pending an appeal from the enforcement order of the United States District Court for the District of Delaware. While he apparently challenges that Court's action in approving the plan on grounds unrelated to the

issues raised in his petition for review, he was not, if aggrieved, limited as to the grounds he might urge on appeal from the order of the district court.

In connection with another pending Section 11 (e) plan, involving Standard Gas and Electric Company,[6] in which enforcement was sought by the Commission in the United States District Court for the District of Delaware, an objecting security holder filed in the Circuit Court of Appeals for the Fourth Circuit a petition for review of the Commission's order approving the plan.[7] As in the present case, the Commission moved to dismiss that petition for review, but before this motion came on for hearing in the Fourth Circuit, the District Court had entered an order refusing to approve the plan in question,[8] and the Commission had announced its intention to appeal to the Circuit Court of Appeals for the Third Circuit. Thereupon, the petition for review filed in the Fourth Circuit was abandoned. Had the petitioner in the Fourth Circuit persisted and had the Fourth Circuit entertained the petition, the Commission and the parties would now be confronted with competitive proceedings in two circuits involving overlapping questions.

3. The possibilities of confusion and waste alluded to above need hardly be elaborated. They arise

[6] *Standard Gas and Electric Company*, Holding Company Act Release No. 5430.

[7] *Fleischmann* v. *Securities and Exchange Commission* (C. C. A. 4, No. 5345).

[8] *In the Matter of Standard Gas and Electric Company*, 59 F. Supp. 274 (D. Del.).

from the fact that the type of order which petitioner has sought to review in the Second Circuit is but a preliminary step in a statutory procedure necessitating approval of the plan by both Commission and enforcement court. As this Court stated, concerning the essentially similar procedure set forth in Section 77 of the Bankruptcy Act, 11 U. S. C. § 205, requiring advance approval by the Interstate Commerce Commission of reorganization plans involving railroads, the function of the Commission and the function of the district court are thoroughly "brigaded" and "intertwined" in such a proceeding. *Palmer* v. *Massachusetts*, 308 U. S. 79, 87.

Where such a statute provides for a sequence of action before the Commission and a court, the subsequent court consideration of the problem theretofore considered by the agency has been recognized by this Court to involve the ordinary function of judicial review. See *Reconstruction Finance Corporation* v. *Bankers Trust Co.*, 318 U. S. 163, 168–70. And, with specific reference to approval of reorganization plans, the function of approval of the plan in the District Court under Section 77 of the Bankruptcy Act, after prior approval by the Interstate Commerce Commission, has been held to preclude review of the Interstate Commerce Commission's order in a three-judge court under a general provision in the Urgent Deficiencies Act [9] for the review of "any order of the Interstate Commerce Commission." See *Chicago &*

[9] Act of Oct. 22, 1913, c. 32, 38 Stat. 208, 220, 28 U. S. C. § 47.

North Western Railway Co. v. *United States*, 320 U. S. 718, affirming *Chicago & North Western Railway Co.* v. *United States*, 52 F. Supp. 65 (N. D. Ill.).

The decisions and practice under the Holding Company Act are likewise in harmony with the decision of the court below. Thus, notwithstanding the general review provision of Section 24 (a) of the Act, the Circuit Court of Appeals for the Seventh Circuit has dismissed a petition, filed under that section, to review an order of the Commission approving, under Section 11 (f) of the Act, the reorganization plans of two companies which were the subject of Chapter X proceedings in a district court. *Gilbert* v. *Securities and Exchange Commission*, 146 F. 2d 513. A plan of reorganization approved by the Commission and a bankruptcy reorganization court has been considered by a circuit court of appeals on appeal from the decision of the district court approving a plan. *In the matter of Associated Gas and Electric Company* (C. C. A. 2, Nos. 203–204, decided March 27, 1945). And in the case of plans of reorganization approved under Section 11 (e), the objectors who have been unsuccessful in resisting approval thereof by a district court have found available the usual avenues for appeal from district court orders. That was the procedure followed in *Otis & Company* v. *Securities and Exchange Commission*, No. 81, this Term, and in *Disman* v. *Securities and Exchange Commission*, certiorari denied, No. 1181, this Term.

Petitioner sees conflict in a ruling of the Circuit Court of Appeals for the Third Circuit preliminary

to the action reported as *Marquis and Company* v. *Securities and Exchange Commission*, 134 F. 2d 822 (C. C. A. 3). In that case the plan of reorganization, unlike the instant plan, as approved by the Commission did not specifically describe the mode of enforcement contemplated by the plan and proponents of the plan endeavored to consummate it by obtaining requisite votes under State law. It is the Commission's position that such an order is reviewable in a circuit court of appeals, and a petition for review was filed prior to any request by the company for court enforcement of the plan. *Cf. Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80; *New York Trust Co.* v. *Securities and Exchange Commission*, 131 F. 2d 274 (C. C. A. 2), certiorari denied, 318 U. S. 786.[10] The Commission accordingly had not initially challenged the reviewability of the order and had filed with the Circuit Court of Appeals for the Third Circuit the transcript

[10] Petitioner urges that the opinion below rests upon a purported ouster of the jurisdiction of the circuit court of appeals by virtue of a provision in the order of the Commission (Pet. 32). In our view, the lack of jurisdiction of the circuit court of appeals rests upon the incompatibility of the review provisions of Section 24 (a) as applied to a situation where a plan approved by the Commission's order is to be consummated only in the event of further approval by the enforcement court. We believe that this follows from the mere fact of the proponent company's having requested court enforcement, or, in any event, from the institution of enforcement proceedings. The only effect of the express provision in the plan and Commission order criticized by petitioner is to make it clear that there is no possibility of the Commission's order being operative as a "licensing" order irrespective of approval by the enforcement court.

of the administrative record, thereby making applicable the language of Section 24 (a) which provides that: "Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part." Thereafter, the companies involved decided that they could not execute the plan without judicial aid, and, at their request, the Commission instituted an enforcement proceeding in the Delaware District Court. The Commission then moved to stay the Circuit Court of Appeals proceeding pending action by the District Court. The motion was denied. Since there was no opinion, it is a matter of speculation whether the denial of the stay was on discretionary considerations, such as the essential similarity of the issues, or because of the applicability of the "exclusive jurisdiction" language of Section 24 (a). Insofar as a jurisdictional ruling may have been implicit in the denial of a stay and the subsequent affirmance of the Commission's order, the decision is only that jurisdiction of a circuit court of appeals which once attaches pursuant to Section 24 (a) will not be defeated by the institution of district court enforcement proceedings after the administrative transcript has been filed in the circuit court of appeals.[11] While the *Marquis* case did present a troublesome problem of procedure, it was not the problem presented in this case, as the court below recognized

[11] Here, of course, it is to the Delaware District Court, rather than the circuit court of appeals, that the Commission has certified the record of the proceeding before it.

(R. 99–100). Thus the petition does not present a case of conflicting decisions in the circuit courts of appeals.

4. Petitioner's second ground for the writ is that "the Commission's order to the extent that it approved the declaration of Bond and Share for the use of $44,000,000 in the acquisition of its preferred stock and attached certain terms and conditions thereto can only be reviewed under Section 24 (a) of the Act." (Pet., p. 41.) We believe that petitioner is correct in treating the portion of the Commission's order which licensed Bond and Share's use of proceeds derived from the plan as severable from its order approving the plan of reorganization of United. That part of the order was not within the scope of the enforcement proceeding in the District Court and, therefore, if reviewable by petitioner, could be reviewed only in a circuit court of appeals pursuant to Section 24 (a) of the Act. It would follow that if petitioner had a basis for challenging that portion of the Commission's order, and had sought review thereof as a separate matter independent of his attack on the plan, we would concede the jurisdiction of the circuit court of appeals over that portion of the petition.

As petitioner states, the lower court in its opinion makes no reference to this phase of the order. Apparently the lower court did not understand that petitioner was attempting to challenge this portion of the Commission's order as a severable matter apart from his objection to the Plan. Whether or

not this was in fact the then position of the petitioner is by no means clear from the papers which he submitted in the court below. However, in view of the vague and insubstantial character of his objections to this portion of the Commission's order, which were obscured by the prolixity of the papers filed with the court below, we submit that any misapprehension as to petitioner's position would not be reversible error.[12]

[12] The court below has elsewhere indicated its difficulty in following the arguments of the present petitioner. *Okin* v. *Securities and Exchange Commission*, 145 F. 2d 913, 914. In the instant case, petitioner submitted to the Circuit Court a 36-page petition for review, a 51-page affidavit in support of a motion for a stay, a 7-page affidavit in opposition to the Commission's motion to dismiss, and a 72-page brief. Such references as were made to petitioner's objection to this portion of the Commission's order did not make the further point now urged in the petition for certiorari that the issue was severable from petitioner's objections to the plan and a matter reviewable only in a circuit court of appeals.

The objection was made in paragraph 41 of the petition for review (R. 53), and thereafter the sole references thereto were made in the affidavit and brief in opposition to the dismissal motion. These references are here set forth in their entirety:

Affidavit: "It is advisable at this point to remind this Court that the said order of the Commission approves many other matters besides the approval of the plan" (R. 90).

Brief: "At the outset it is important to note that in their anxiety to convince this Court that it should not review the order claimed to have been made under Section 11 (e) of the Act, counsel for the Commission and the other companies forgot to tell this Court that many other matters were involved in the order of the Commission besides the plan and that many other sections of the Act are involved in addition to Section 11 (e). However, at this point we

Turning to the nature of the objections in question, we do not understand that petitioner objects to Bond and Share purchasing its outstanding preferred stock. Apparently he would prefer a program which would include invitations for tenders from holders of Bond and Share preferred stock rather than market purchases as proposed by the management and as limited by the Commission's order. As currently phrased, the objection to this part of the Commission's order is that it "attached conditions and terms wholly without authority in law and beyond any jurisdiction of the Commission" (Pet., p. 42). The only conditions which restrict Bond and Share relate to such matters as disclosures to the Commission and to security holders, the duration of the authorization to purchase and a requirement for cancellation of the stock reacquired (R. 66, 67, conditions 1 to 6, inclusive). By conditions 7 and 8 the Commission reserves jurisdiction to consider substitute or additional programs with respect to the use of the money and to rescind or modify its order.

Since the order left Bond and Share free to apply for further and broader authorization with respect to the use of cash derived from the Plan, and, of course, to seek judicial review of any future adverse order, petitioner's present difference with the Bond

will confine our argument to a consideration of the matters presented under Section 11 (e) and refer to the other provisions of the order and other sections of the Act involved at a latter point herein." This statement appeared at page 59 of the 72-page brief, and the matter was not discussed again despite the assertion that it would be.

and Share management can relate only to the timing of its efforts to obtain a release from any restrictions with which Bond and Share would not voluntarily comply. Thus, even if for reasons not revealed by petitioner, there could be some legal objection which might be urged on behalf of Bond and Share to any of the conditions restricting Bond and Share's authorization to purchase its preferred stock, petitioner has shown no present justification for displacing the management in its decision not to litigate the issue at this time. In that respect we believe that petitioner's objections to those provisions of the order which are severable from the Commission's approval of the plan are insufficient to give him standing to sue for the same reasons as were recently presented to this Court in *Securities and Exchange Commission* v. *Okin*, No. 815, this Term.[13] Even if this

[13] For similar reasons we believe that Okin, as a stockholder of Bond and Share, was not a "person aggrieved" with standing to challenge the fairness of the plan to Bond and Share. We would not, of course, challenge the standing of a public stockholder of United Gas to attack the treatment accorded him in the plan, since the plan was a plan of reorganization of United Gas. Nor would we challenge the standing of public security holders of Electric to challenge the treatment of its claim, *vis-a-vis* Bond and Share, in view of the dominant position of Bond and Share and the conflict of interest involved. However, Okin has indicated no reason why the Bond and Share management was not free to represent the interests of Bond and Share in negotiating the compromise embodied in the plan. While this point was raised by the Commission in the court below as a matter of consistency with its position in other cases, no attempt was made to reargue the point in view of the prior ruling of the court below in the *American & Foreign Power* case, now pending as No. 815 in this Court.

Court should be of the opinion that petitioner is aggrieved and that the frivolous character of his objections would not warrant dismissal prior to the filing of a transcript of the record upon which the order complained of was entered, the failure to observe that formality in this case can hardly have prejudiced petitioner, in view of the patently insubstantial objections to this portion of the order.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Securities and Exchange Commission.
MAY 1945.

APPENDIX

Section 11 (e) of the Public Utility Holding Company Act provides as follows:

> In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall

have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

Section 18 (f) of the Act provides as follows:

> Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this title or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this title.

Section 24 of the Act provides as follows:

> (a) Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order,

a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission, or upon any officer thereof designated by the Commission for that purpose, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission or unless there were reasonable grounds for failure so to do. The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court affirming, modifying, or setting aside, in whole or in part, any such order of the Commission shall

be final, subject to review by the Supreme Court of the United Stats upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

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